LIEW YEW TIAM & ORS

v.

CHEAH CHENG HOC & ORS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
ABDUL KADIR SULAIMAN JCA
[CIVIL APPEAL NO: W-02-168-2000]
11 JANUARY 2001

TORT: *Damages - Joint tortfeasors - Whether separate awards against each tortfeasor proper - Whether there can only be one award against all joint tortfeasors*

TORT: *Damages - Assessment - Libel - Extent of publication - Relevance of - Restricted publication - Whether damages awarded excessive - Whether aggravated damages should be awarded*

TORT: *Defamation - Damages - Principles and trends in awarding damages - Injury to reputation - Engine of oppression - Freedom of expression - Whether trend of awarding huge sums should be checked*

The issue in this appeal concerned the quantum of damages in a libel action. The learned judge had made separate awards of damages against each appellant: (i) RM500,000 against the first appellant; (ii) RM300,000 against the second appellant; (iii) RM50,000 against the third appellant; and (iv) RM150,000 against the fourth appellant. The appellants complained that the awards were too high and the respondents contended that they were too low. Hence, the appeal and cross-appeal.

Held:
Per Gopal Sri Ram JCA

[1] The width or extent of publication is always a relevant consideration when assessing damages in an action for defamation. The libel here was published only to two firms of solicitors. However, the learned judge had merely mentioned that there was restricted publication. He did not attach to that element the weight and significance it deserved. This was a misdirection on the part of the learned judge.

[2a] There was on that facts but one libel upon the respondents. It was in the letter authored by the firm of solicitors jointly instructed by the appellants. Thus the appellants were joint tortfeasors. Hence, only a single award was admissible against all the appellants.

[2b] The learned judge fell into error when he made separate awards of damages against each of the appellants. A global award of RM100,000 would be a fair, just and adequate compensation for the libel inflicted upon the respondents.

[3] The elements that warrant the making of an award of aggravated or punitive damages were lacking in the present case. Therefore, the learned judge was correct when he did not make such an award.

Per curiam:

[1] The underlying philosophy of the decisions of both the Federal Court and the Court of Appeal in *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* was that injury to reputation is as, if not more, important than the loss of a limb. However, the time has now come when the trend set by that case should be checked to ensure that an action for defamation is not used as an engine oppression. Otherwise, the constitutional guarantee of freedom of expression will be rendered illusory.

[Appeal allowed; cross-appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Isu di dalam rayuan ini adalah mengenai kuantum gantirugi dalam sesuatu tindakan libel. Hakim yang bijaksana telah mengawardkan award gantirugi yang berasingan kepada setiap satu perayu: (i) RM500,000 terhadap perayu pertama; (ii) RM300,000 terhadap perayu kedua; (iii) RM50,000 terhadap perayu ketiga; dan (iv) RM150,000 terhadap perayu keempat. Perayu-perayu mengadu bahawa ianya agak terlalu banyak dan responden-responden pula menegaskan bahawa ianya terlalu sedikit. Dengan itu, terdapatnya rayuan dan rayuan bersaling ini.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Luasnya penerbitan adalah selalunya pertimbangan yang relevan ketika menaksirkan gantirugi dalam sesuatu tindakan untuk fitnah. Libel tersebut telah diterbitkan hanya kepada dua firma peguamcara. Hakim yang bijaksana hanya telah menyebut bahawa penerbitan adalah terhad. Walaubagaimanapun ianya tidak menyertakan dengan elemen itu penekanan dan sifat pentingnya yang harus diberikan. Ini adalah satu salah arahan di pihak hakim yang bijaksana.

[2a] Berdasarkan fakta-fakta kes, hanya terdapat satu libel ke atas responden-responden. Ianya terdapat dalam surat yang dikarang oleh firma peguamcara yang diarah secara bersesama oleh perayu-perayu. Oleh itu perayu-perayu adalah pelaku-pelaku tort bersama. Hanya satu award boleh diberi.

[2b] Hakim yang bijaksana telah melakukan kesilapan apabila beliau membuat award-award gantirugi yang berasingan terhadap setiap satu perayu-perayu tersebut. Beliau sepatutnya hanya membuat satu award terhadap kesemua perayu-perayu tersebut. Satu award global sebanyak RM100,000 adalah pampasan adil, saksama dan memadai untuk libel yang dilemparkan ke atas responden-responden tersebut.

[3] Atas fakta-fakta yang diasaskan oleh hakim yang bijaksana, unsur-unsur yang mewajarkan sesuatu award gantirugi teruk tidak ada. Oleh itu, hakim tersebut tidak membuat award yang sedemikian.

Per curiam:

[1] Falsafah yang terdapat dalam keputusan Mahkamah Persekutuan dan Mahkamah Rayuan dalam kes *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* ialah pencemaran nama baik reputasi adalah, atau pun, lebih penting dari kehilangan mana-mana anggota badan. Walaubagaimanapun, masanya sudah tiba apabila haluan yang telah ditetapkan oleh kes tersebut sepatutnya diperiksa untuk memastikan tindakan fitnah tidak digunakan sebagai enjin penindasan. Jikalau tidak, perlembagaan jaminan kebebasan ekspresion akan digambarkan sebagai satu ilusi.

[Rayuan dibenarkan; rayuan balas ditolak.]

Case(s) referred to:

AJA Peter v. OG Nio & Ors [1980] 1 MLJ 226 ***(refd)***
Cassel & Co Ltd v. Broome & Anor [1972] 1 All ER 801 ***(foll)***
Dougherty v. Chandler & Ors [1946] 46 SR (NSW) 370 ***(foll)***
Greenlands Ltd v. Wilmshurst [1913] 3 KB 507 ***(foll)***
Hill v. Church of Scientology of Toronto [1995] 2 SCR 1130 ***(refd)***
Humphries v. TWT Ltd [1994] 120 ALR 693 ***(refd)***
Ling Wah Press (M) Sdn Bhd & Ors v. Tan Sri Dato' Vincent Tan Chee Yioun & Others Appeals [2000] 3 CLJ 728 ***(dist)***
MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [1995] 2 CLJ 912 ***(dist)***
Nurse v. Rustomji Dorabji AIR [1924] Mad 565 ***(refd)***
Skrine & Co v. MBf Capital & Anor [1998] 3 CLJ 432 ***(dist)***
Tolstoy Miloslavsky v. The United Kingdom [1995] 20 EHRR 442 ***(refd)***

Legislation referred to:
Federal Constitution, art. 10(1)(a)

European Convention of Human Rights, art. 10(1)

For the appellants - Khoo Wai Tuck (Hariati Faezah with him); M/s Hariati & Khoo
For the respondents - N Chandra (S Siva & PY Au Yong with him); M/s Cheah Teh & Su

Reported by Suhainah Wahiduddin

JUDGMENT

Gopal Sri Ram JCA:

There is only one issue in this appeal. It has to do with the quantum of damages in a libel action. The appellants complain that the judge gave too much. The respondents say that it is too little. They cross-appealed. We heard the appeal and cross-appeal on 23 October. The appeal was allowed. The award of damages was reduced. The cross-appeal was dismissed. The reasons for our decision now follow.

There is no dispute about the essential facts. The respondents are a reputable firm of solicitors. They mainly handle commercial matters – both conveyancing and litigation. The appellants owned a piece of immovable property. They had borrowed money and were financially strained. They wanted to sell their property and settle their debts. Initially a purchaser came forward. But appellants aborted the sale because they had received a better offer from another source. A sale and purchase agreement was drawn up. Another firm of solicitors, M/s Paul Ong & Co, represented the buyer. There is no doubt that the respondents acted with utmost propriety throughout the entire transaction. While this sale was on foot, the appellants were once again attracted by another higher offer. They wanted to throw overboard the sale to M/s Paul Ong & Co.'s client. They engaged another firm of solicitors and instructed them to write a letter to M/s Paul Ong & Co. The letter contained certain allegations against the respondents. It was copied to another firm of solicitors, M/s Kumar, Jaspal & Quah representing the financial institution from which the buyer was obtaining funds to complete the purchase.

The judge found them to be highly defamatory. Of that, there is no doubt. The appellants relied on the defences of justification and qualified privilege. Both defences failed. The judge found the statements in the letter to be utterly false. He rejected qualified privilege on the ground that the appellants had been motivated by malice. His findings are entirely justified in the teeth of the evidence. Based on his findings, the judge awarded the following damages:

(i) RM500,000 against the first appellant; (ii) RM300,000 against the second appellant; RM50,000 against the third appellant; and RM150,000 against the fourth appellant.

The reason for the judge's assessment appears in the following passage in his judgment:

> The sum awarded against the 1st defendant is more substantial than the other defendants for the reason that she was the fugleman in this entire episode of defamation. The others were merely foot soldiers who followed their leader blindly and without thinking despite the fact that they were all more educated than the 1st defendant. The 2nd defendant was more of a lieutenant to the 1st defendant. She was more involved in this wrong than the 4th defendant. As for the 3rd defendant she was entirely out of the country throughout. She merely lent her name. But nevertheless they are all liable. It is only a matter of degree of their involvement which is relevant in the assessment of damages, and it is on this that the quantum of damages awarded against them is based.
>
> The defamation was made with malice and with ulterior motive to gain certain monetary advantage *ie*, to terminate the Agreements in order to demand more money out of the purchaser. Such motives and actions by the defendants are deplorable, particularly in this instance, when it consists of the allegation of the plaintiffs in conspiring with others so named to defraud. Such accusation is serious, for if prosecuted and found liable, the plaintiffs may land themselves in jail. The consequence of this defamation must have caused mental anguish and distress to the plaintiffs. The plaintiffs were and are advocates and solicitors where reputation of honesty and integrity is a hallmark in their profession. To attack them on this vital element is most humiliating and damaging. Fortunately the publication of these defamatory statements were restricted, but still, damage is done.
>
> There was no apology tendered despite request and after the plaintiffs had explained in detail of the error committed by the defendants in that there was no truth in each accusation.
>
> It is for these reasons that I have awarded the amounts stated above.

In making his award, the learned judge purported to follow the decision of the Federal Court in *Ling Wah Press (M) Sdn. Bhd. & Ors v. Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals* [2000] 3 CLJ 728, affirming the decision of this Court in *MGG Pillai v. Tan Sri Dato Vincent Tan Chee Yioun* [1995] 2 CLJ 912. We must say at once that the present case bears no resemblance to the facts of *Ling Wah Press (ibid)*. A distinguishing feature of fundamental importance is the area of dissemination of the libellous material. In the *Ling Wah Press* case, the libel was published to all and sundry by means of a series of articles in a magazine. In the present case it was published only to two firms of solicitors who were concerned in the transaction that had been entered into.

The width or extent of publication is always a relevant consideration when assessing damages in an action for defamation. In *A.J.A. Peter v. O.G. Nio & Ors* [1980] 1 MLJ 226, at 236, Abdul Hamid J, (as he then was), said:

> In the light of the law concerning the assessment of damages, it is apparent that it is indeed difficult to draw a fair comparison with awards in others types of action and to put forward in competitive standards by which the right figure can be gauged in any particular case. It is also evident that in the assessment of damages the courts will be guided by certain factors amongst them the seriousness of the defamation, the special damages, injury to plaintiff's feelings, the extent of the publication and the mitigating factors.

In the case before us, the learned judge merely mentioned in passing that there had been restricted publication. However, he did not attach to that element the weight and significance it deserved. This, in our judgment, amounts to a misdirection on the part of the learned judge.

There is another point upon which we find ourselves in disagreement with the approach adopted by the learned judge. It has to do with the separate award that he made against each appellant.

There was on the facts but one libel upon the respondents. It was in the letter authored by the firm of solicitors jointly instructed by the appellants. So the appellants were in truth and in fact joint tortfeasors. Hence only a single award was admissible against all the appellants.

If authority is required for this proposition, it is to be found in the speech of Lord Hailsham in *Cassell & Co Ltd. v. Broome and Another* [1972] 1 All ER 801. At p. 817 of the report, after referring to the judgments of Lord Denning MR and Salmon LJ in the Court of Appeal, his Lordship said:

> With respect to both judgments which, as will be seen, are arguably not quite consistent with one another, I think the effect of the law is exactly the opposite and that awards of punitive damages in respect of joint publications should reflect only the lowest figure for which any of them can be held liable. **This seems to me to flow inexorably both from the principle that only one sum may be awarded in a single proceeding for a joint tort,** and from the authorities which were cited to us by counsel for the appellants in detail in the course of his argument. Counsel referred us to *Heydon*'s case, *Clark v. Newsam, Hill v. Goodchild, Dawson v. M'Clelland, Greenlands Ltd. v. Wilmshurst* ([1913] 3 KB 507, especially at 521), *Smith v. Streatfeild* ([1913] 3 KB 764 at 769, [1911–13] All ER Rep 362 at 364), *Chapman v. Lord Ellesmere* ([1932] 2 KB 431 at 471, [1932] All ER Rep 221 at 237) per Slesser LJ, *Dougherty v. Chandler, Egger v. Viscount Chelmsford* ([1964] 3 All ER 406 at 411, [1965] 1 QB 248 at 262) and to the current edition of Gatley. I think that the inescapable conclusion to be drawn from these authorities is that

only one sum can be awarded by way of exemplary damages where the plaintiff elects to sue more than one defendant in the same action in respect of the same publication, and that this sum must represent the highest common factor, that is the lowest sum for which any of the defendants can be held liable on this score. Although we were concerned with exemplary damages, I would think that the same principle applies generally and in particular to aggravated damages, and that dicta or apparent dicta to the contrary can be disregarded. As counsel conceded, however, plaintiffs who wish to differentiate between the defendants can do so in various ways, for example, by electing to sue the more guilty only, by commencing separate proceedings against each and then consolidating, or, in the case of a book or newspaper article, by suing separately in the same proceedings for the publication of the manuscript to the publisher by the author. Defendants, of course, have their ordinary contractual or statutory remedies for contribution or indemnity so far as they may be applicable to the facts of a particular case. But these may be in applicable to exemplary damages. (emphasis added.)

In *Greenlands Ltd. v. Wilmshurst* [1913] 3 KB 507, Hamilton LJ (later Lord Sumner) treated the point under present discussion as settled. He said (at p. 531):

The unity of the verdict and of the judgment when the tort joint is founded on and must stand with the legal theory of the liability of joint tortfeasors. 'It is the necessary and logical result of the legal principles applicable to this kind of action. What the plaintiff is entitled to receive is a sum representing the damage that he has suffered from a single wrong inflicted by all. One defendant has no right to say that his contribution to the injury was smaller than that of the others': Holmes LJ in *Dawson v. M'Clelland* [1899] 2 IR 486. See also *Brown v. Wootton* [1605] Cro. Jac. 73; *Mitchell v. Milbank* [1795] 6 TR 199; *Eliot v. Allen* [1845] 1 CB 18. Whatever may be the rule in a case of conspiracy where several defendants join it at different dates and do several acts in furtherance of it, or in the case of continuing torts like nuisance or letting down the surface of land (*O'Keeffe v. Walsh* [1845] 1 CB 18), it is clear that, in the case of an action for a single tort against tortfeasors, neither the Judicature Acts nor Order XVI have altered the law, though text-books of authority seem to have varied in their view of the matter. Chitty's Archbold, 1885, p. 666, is to the above effect; *Bullen and Leake*, 6th ed., p. 57, suggests a different opinion. Probably the rule has often been disregarded in practice, sometimes by consent, often because it was of no practical importance, but this cannot affect the rule or its obligation. The point has been raised and must be decided. In my opinion the law has been settled too long for this Court to disturb it. As the action was framed, the verdict was wrongly found.

Finally, we would refer to *Dougherty v. Chandler & Others* [1946] 46 SR (NSW) 370. It is a decision of the Full Court of the Supreme Court of New South Wales. The relevant passage appears in the instructive judgment of Jordan CJ (NSW) at p. 375:

The second ground of appeal makes it necessary to consider the nature and extent of the liability of joint tortfeasors, that is, of persons who have been jointly concerned in the commission of a tort. Putting aside the case of two persons whose joint liability arises from the fact that one is vicariously responsible for the acts of the other – a case which has special features – the general position is as follows. If a number of persons jointly participate in the commission of a tort, each is responsible, jointly with each and all of the others, and also severally, for the whole of the damage caused by the tort, irrespectively of the extent of his participation. As regards damages, a person who commits a tort is liable to pay full compensation for all actually resultant damage which is 'direct' or 'not too remote,' and also any resultant damage, whether direct or not, which he intended, or which he contemplated or ought to have contemplated. In the case of joint tortfeasors, all are liable, to the extent stated, for all the damage caused to the plaintiff by their joint tort; but under a count in an action at law alleging a joint tort nothing can be recovered against those who are found guilty except in respect of conduct in which all so found guilty have participated; **and the damages awarded cannot be apportioned amongst them:** *London Association for Protection of Trade v. Greenlands Ltd.* [1916] 2 AC 15. Unless the tort is one capable of being committed only by several of the defendants, one only may be found guilty of the act complained of, as a several tort committed by him: *McKernan v. Fraser* [1931] 46 C.L.R. 343; *Parker v. Paton* [1941] 41 SR (NSW) 237.

These general principles are just as applicable to joint defamation as to any other joint tort. Defamation is one of the torts in respect of which a jury is entitled to award not only compensatory damages but, in addition, if there is evidence justifying the inference that there are aggravating circumstances associated with the defamation, exemplary damages, that is, damages intended to mark the jury's disapproval of the defendant's behaviour. For this purpose, the defendant's conduct right up to the moment when damages are assessed may be considered: *Walter v. Alltools Limited* [1944] 171 LT 371. Within this rule is included the case where there is evidence of 'express malice' on the part of the defendant, for example, a vindictive desire to do the plaintiff as much harm as possible. Where several defendants are charged with joint defamation, and express malice is established against one only, it has been said that the express malice of the one is fatal to the success of a plea of privileged occasion or fair comment by all or any: *Smith v. Streatfield* [1913] 3 KB 764; *Webb v. Bloch* [1928] 41 CLR 331; *Musgrave v. The Commonwealth* [1936-7] 57 CLR 514; *Gatley on Libel and Slander*, 3rd ed., 630, 661. This may be true enough where the others are, on general principles, vicariously liable for the acts of the one: cf. *Brain v. Commonwealth Life Assurance Society Ltd* [1934] 35 SR (NSW) 36; *Smith v. Commonwealth Life Assurance Society Ltd* [1935] 35 SR (NSW) 552. But, except in this class of case, I think, with all respect, that, as a matter of principle, where, to defeat a plea of several defendants sued jointly, it is necessary for the plaintiff to prove express malice, he must fail as against any defendant to whom he is unable to sheet home express malice. The statement that express malice of one must, in relation to

liability, be regarded as express malice of all appears to depend upon *Smith v. Streatfield* [1913] 3 KB 764, a decision of a single Judge, which was doubted by the Court of Appeal in *Crozier v. Wishart Books Ltd.* [1936] 1 KB 471, and was described as 'a tottering authority' by Uthwatt J in *Smith v. National Meter Co. Ltd.* [1945] KB 543. *But, however this may be, I am of opinion that, in a case of joint libel, nothing can be awarded in respect of additional exemplary damages for aggravating circumstances unless it is established either that all the defendants who are found guilty participated in the aggravating circumstances, or that those who did not are, for some reason, vicariously liable for the conduct of those who did: Robertson v. Wylde* [1838] 2 Mood & R. 101; *Dawson v. M'Clelland* [1899] 2 IR 486; *Mutch v. Sleeman* [[1928] 29 SR (NSW) 125; *Chapman v. Lord Ellesmere* [1932] 2 KB 431. Applying these principles, I am of opinion that the portion of the summing up which was objected to cannot be supported. (emphasis added)

It follows that the learned judge fell into error in making separate awards of damages against each of the appellants. On the authorities about which there is no doubt, he ought to have made only one award against all the appellants. The present appeal therefore comes well within the category of cases in which this court is entitled to interfere.

The role of an appellate court in cases as the present instance is not in doubt. It has been settled by high authority. What this court should bear in mind is the important differences between England and Malaysia upon the approach to the assessment of damages in an action for defamation. Whereas a jury assesses such damages in England, in this country a judge sitting alone assesses them. The position in India is much the same as our own.

Thus, in *Nurse v. Rustomji Dorabji* AIR [1924] Mad. 565, Sir Walter Schwabe, CJ said (at p. 567):

There remains only the question of damages. In countries where these questions of tort are tried before a Jury, damages are eminently in the province of Jury. Where, however, a case is tried before a Judge, the Judge has a very wide discretion, on the facts of the case before him, to say what, in his view, the damages should be; but it is no doubt easier, to get the damages reduced on a judgment from a Judge than, as in England in the case of a verdict by a Jury; because a Judge, in his judgment, states his reasons, when he gives damages and states what influences him, or what is in his mind when he gives those damages; whereas in England, where the Jury give no reasons, it is almost impossible for the Court of Appeal to know what operated on the mind of the Jury and it is difficult to establish that the damages are so excessive that no reasonable body of twelve men could have come to that measure of damages. I have had some little doubt in this case whether the learned Judge, who quite fully states his reasons for taking rather a strong view of the case as to damages was not inclined to severity, but on the whole, I think not. I am not certain

as to whether I should not have awarded a lesser amount, but that is not what I have to consider. What I have to consider is whether the learned judge was wrong in awarding the damages that he did.

Eusoff Chin CJ in the *Ling Wah Press* case (at p. 732 of the report) dealt with the question in the same way:

> Damages in a libel case are essentially matters of impression. The Federal Court of Australia in *Humphries v. T.W.T. Ltd.* [1994] 120 ALR 693 at 700 agreed with Dixon J in *Smith Newspapers Ltd v. Becker* [1932] 47 CLR 279 at 300 who described the role to be performed by the appellate court in appeals against damages assessed by a judge in defamation cases:
>
> > We are not in the same position as the judge at the trial for assessing damages for defamation. He has an opportunity denied to us of judging the true character of the plaintiff whose sensibility, refinement and feelings of honour are, where they exist, of no little importance when he is held up to public obloquy and infamy. So far as the conduct of the trial forms an aid in estimating the degree of impropriety involved in the publication complained of, the trial judge has peculiar advantages. The question of what amount awarded to the victim of a public outrage is enough to serve at once as a solatium, vindication and compensation to him and a requital to the wrongdoer can only be solved by an exercise of a discretionary judgment, and a court of appeal should not, in my opinion, interfere and review the sum fixed unless it is able to infer from the amount adopted by the trial judge, or otherwise, that in some way his discretion must have miscarried.
>
> The assessment of damages is the province of the trial judge, and an appellate court is not entitled to substitute its own judgment merely because it would have arrived at a different figure. Unless the verdict is so outrageously exorbitant, or shockingly excessive in relation to the libel, or manifestly unreasonable, unjust or irrational, the appellate courts should proceed with caution before making any variation in assessment of damages in libel cases.

There is another passage in the case of *Humphries v. T.W.T. Ltd (supra)* referred to in the *Ling Wah Press* case which is also of much assistance to the present appeal. It reads:

> Where it is not shown that the trial judge acted upon a wrong principle of law or misapprehended the facts, the court will infer that the judge's discretion miscarried only where it is satisfied that the amount is so high or so low as to be a wholly erroneous estimate of the damages to which the party is entitled. Where specific error in principle or fact cannot be identified Fox J in *Mirror Newspapers Ltd v. Jools* 65 ALR 174 at 176 said:

> It then becomes a question of what matters his Honour could properly have taken into account in arriving at this amount, and whether, bearing these matters in mind, the award should be disturbed.

Applying the principles established by the authorities and having regard to all the relevant circumstances of the case and adopting a common sense approach to the facts, we came to the conclusion that a global award of RM100,000 would be a fair, just and adequate compensation for the libel inflicted upon the respondents. In the process of making our assessment we have not overlooked the recent trend in this country of claims and awards in defamation cases running into several million ringgit. No doubt that trend was set by the decision of this Court in *MGG Pillai v. Tan Sri Dato Vincent Tan Chee Yioun (supra)*. It is a decision that has been much misunderstood. The underlying philosophy of that decision is that injury to reputation is as, if not more, important to a member of our society than the loss of a limb. But we think the time has come when we should check the trend set by that case. This is to ensure that an action for defamation is not used as an engine of oppression. Otherwise, the constitutional guarantee of freedom of expression will be rendered illusory.

In this context we mention that the European Court of Human Rights in the case of *Tolstoy Miloslavsky v. The United Kingdom* [1995] 20 EHRR 442 held that an award of £1.5 million by an English jury violated the freedom of expression guaranteed by art. 10(1) of the European Convention of Human Rights. That article, though more elaborate in terms than the right enumerated in art. 10(1)(a) of the Federal Constitution, in essence houses the same principle. Now, it is true that in *Skrine & Co v. MBf Capital & Anor*. [1998] 3 CLJ 432, this court, in an oral judgment, rejected an argument based on art. 10(1)(a) of the Constitution. But the remarks in that case were made in the context of quantifying damages in a pleading and not in the making of an award.

We would add that we do not regard the affirmation by the Federal Court of the decision in *MGG Pillai v. Tan Sri Dato Vincent Tan Chee Yioun (ibid)* as an insurmountable hurdle of binding precedent to our decision in the present case. For, at the end of the day, the Federal Court affirmed the award made in the circumstances of that particular case as a proper exercise of judicial discretion by the High Court upon the question of damages. We do not think that it automatically follows as a matter of policy that the plaintiff in every case should be entitled to receive an award in millions of ringgit.

There is one further matter that must be addressed. It is the respondents' cross appeal. The substance of the complaint here is that the judge should have awarded aggravated or punitive damages in addition to the award he made. The making of such an award is in the discretion of the judge and we find no reason to disturb his decision not to make such an award.

Additionally, the cross appeal is, we think, sufficiently met by the decision of the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto* [1995] 2 SCR 1130. Cory J, who delivered the judgment of the court (La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ) said:

> Aggravated damages may be awarded in circumstances where the defendant's conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement. If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further a field the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff.

On the facts found by the learned judge the elements that warrant the making of an award of aggravated damages were plainly lacking in the present instance. It therefore comes as no surprise that the judge did not make such an award.

For the reasons already given, the appeal was allowed on the issue of damages. The award made by the learned judge was set aside. In its place we substituted an award of RM100,000. As the appellants drove the respondents to this litigation we were of the view that it is just and fair that they should bear the costs of the appeal. We however made no order as to costs upon the dismissal of the cross appeal.